

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

LABOR READY SOUTHWEST, INC., A
SUBSIDIARY OF TRUEBLUE, INC.,

And

SMITH WILLIAMS

Petitioners,

v.

NATIONAL LABOR RELATIONS
BOARD,

Respondent.

Case No. _____

PETITION FOR REVIEW

Pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure, Labor Ready Southwest, Inc., a subsidiary of True Blue, Inc. and Smith Williams (hereinafter “Petitioners”), hereby petition the United States Court of Appeals for the Fifth Circuit for review of a Decision and Order of the National Labor Relations Board (hereinafter “Respondent” or “NLRB”) in the matter styled Labor Ready Southwest, Inc., a subsidiary of TrueBlue, Inc.. and Jason Kuller, Esq. of Thierman Law Firm, P.C., NLRB Case No. 31-CA-072914, dated February 26, 2016. Said Decision and Order is attached hereto as Exhibit A. This Court has

jurisdiction in this matter pursuant to Section 10(f) of the National Labor Relations Act because the NLRB's "Decision and Order" is a final order. 29 U.S.C. § 160(f).

Petitioner Labor Ready Southwest, Inc., a subsidiary of TrueBlue, Inc. ("Petitioner Labor Ready") is a party aggrieved by said Decision and Order. Petitioner Labor Ready transacts business within this judicial circuit, as defined in 28 U.S.C. § 41, by, inter alia, maintaining an office in this Circuit staffed by a Regional Vice President of TrueBlue, Inc. who has authority and responsibility to manage operations of Labor Ready Southwest.

Petitioner Williams is a person aggrieved by said decision because he, in his capacity as a Regional Vice President of TrueBlue, Inc., exercises managerial authority over operations of Petitioner Labor Ready. and is thereby an agent of Petitioner Labor Ready. By its terms, the Order in the Decision and Order that is the subject of this Petition applies to Petitioner Labor Ready's "officers, agents, successors, and assigns."

The NLRB's Decision and Order against the Petitioners is not supported by substantial evidence and is contrary to law, including this Circuit's decisions in D.R. Horton Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013) and Murphy Oil USA, Inc. v. NLRB, No. 14-60800, 2015 WL 6457613 (5th Cir. Oct. 26, 2015).

WHEREFORE, Petitioners respectfully pray that this Court review and set aside the Order of the NLRB which found that Petitioner Labor Ready violated

Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §158(a)(1), and that Petitioners receive any further relief to which they may be entitled.

Respectfully submitted this 7th day of March, 2016.

/s/ Susan Fahey Desmond
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ATTORNEYS FOR PETITIONERS

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

LABOR READY SOUTHWEST, INC., A
SUBSIDIARY OF TRUEBLUE, INC.,

And

SMITH WILLIAMS

Petitioners,

v.

NATIONAL LABOR RELATIONS
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Case No. _____

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2016, a true and correct copy of the foregoing Petition for Review, with attachment, was served by overnight mail on the following:

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Counsel, Appellate and Supreme Court Litigation Branch

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By: /s/ Susan Fahey Desmond

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**Labor Ready Southwest, Inc., a Subsidiary of
TrueBlue, Inc. and Jason Kuller, Esq. of
Thierman Law Firm, P.C. Case 31–CA–072914**

February 26, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND MCFERRAN

On April 29, 2014, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The judge found, applying the Board's decision in *D. R. Horton*, 357 NLRB No. 184 (2012), enf. denied in part, 737 F.3d 344 (5th Cir. 2013), that the Respondent violated Section 8(a)(1) of the Act by maintaining an arbitration agreement that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. The judge also found, relying on *D. R. Horton* and *Ingram Book Co.*, 315 NLRB 515, 516 fn. 2 (1994), that maintaining the arbitration agreement violated Section 8(a)(1) because employees reasonably would believe that it bars or restricts their access to the Board and its processes. In *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in part, 808 F.3d 1013 (5th Cir. 2015), the Board reaffirmed the relevant holdings of *D. R. Horton*, supra. The Board has considered the judge's decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided, based on the judge's application of *D. R. Horton* and on our subsequent decision in *Murphy Oil*, to affirm the judge's rulings,¹ findings,² and

¹ The General Counsel argues that the judge erred by failing to consider the complaint allegation that the Respondent unlawfully attempted to enforce the arbitration agreement before the Superior Court of the State of California. We reject this argument. The parties stipulated that the issues presented for resolution were: (1) "Whether the mandatory arbitration agreement contained in Labor Ready's Application for Employment signed by Allen, the subject of Labor Ready's September 28, 2011 Motion to Compel Allen to individual arbitration, violates Section 8(a)(1) of the Act by mandating individual arbitration of employment-related claims, as alleged in the Complaint;" and (2) "Whether the mandatory arbitration agreement contained in Labor Ready's Application for Employment signed by Allen, the subject of Labor Ready's September 28, 2011 Motion to Compel Allen to individual arbitration, violates Section 8(a)(1) of the Act by restricting access to the Board

and its processes, as alleged in the Complaint." The Board has long held that a stipulation is conclusive on the party making it and prohibits any further dispute as to the stipulated matters. *Woodland Clinic*, 331 NLRB 735, 741 (2000). This is at least in part because parties may choose to forgo offering evidence in favor of reliance on the stipulation. *Arbors at New Castle*, 347 NLRB 544, 545 (2006). Here, the General Counsel joined in stipulating issues for resolution that did not encompass the complaint's enforcement allegation. The Respondent did not address the enforcement allegation in its submissions to the judge and may have forgone seeking to include relevant evidence in the stipulated record in reliance on the scope of the issues as stipulated. We therefore agree with the judge that the enforcement allegation is not at issue here.

² The judge found that the Respondent's maintenance of the arbitration agreement violates Sec. 8(a)(1) because employees would reasonably read the agreement to restrict their ability collectively to seek redress from the Board. We more broadly find that the agreement unlawfully restricts employees' ability to access the Board and its processes both collectively and on an individual basis. Contrary to the Respondent and our dissenting colleague, the agreement's parenthetical exclusion of "actions arising under the NLRA," without further explanation, is insufficiently clear to ensure that employees with no legal training understand that they retain the right to file an unfair labor practice charge with the Board and that they can do so with or on behalf of other employees. See *SolarCity Corp.*, 363 NLRB No. 83, slip op. at 4–6 (2015); *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enf. mem. 255 Fed.App'x. 527 (D.C. Cir. 2007); see also *Ingram Book Co.*, supra, at 516 fn. 2 (1994) ("[r]ank-and-file employees do not generally carry lawbooks to work or apply legal analysis to company rules as do lawyers, and cannot be expected to have the expertise to examine company rules from a legal standpoint."); *McDonnell Douglas Corp.*, 240 NLRB 794, 802 (1979) (finding facially overbroad no-distribution rule with exception for "matter the distribution of which is protected by Section 7 of the National Labor Relations Act" unlawful and explaining that "it can reasonably be foreseen that employees would not know what conduct is protected by the National Labor Relations Act and, rather than take the trouble to get reliable information on the subject, would elect to refrain from engaging in conduct that is in fact protected by the Act"). The arbitration agreement here expressly requires individual arbitration of "any disputes arising" from employees' employment, specifically including, inter alia, all discrimination and wrongful termination claims, which are both frequent subjects of unfair labor practice charges. We do not presume that all employees would understand the exception for "actions arising under the NLRA" to refer specifically to their unobstructed right to file unfair labor practice charges with the National Labor Relations Board. (Indeed, our dissenting colleague acknowledges that employees may not be familiar with that terminology). Finally, for the reasons stated in *Ralph's Grocery*, 363 NLRB No. 128 (2016), we disagree with our dissenting colleague's argument that an individual arbitration agreement lawfully may require the arbitration of unfair labor practice claims.

Our dissenting colleague observes that the Act does not "dictate" any particular procedures for the litigation of non-NLRA claims, and "creates no substantive right for employees to insist on class-type treatment" of such claims. This is all surely correct, as the Board has previously explained in *Murphy Oil*, supra, 361 NLRB No. 72, slip op. at 2, and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 and fn. 2 (2015). But what our colleague ignores is that the Act does "creat[e] a right to pursue joint, class, or collective claims if and as available without the interference of an employer-imposed restraint." *Murphy Oil*, supra, slip op. at 16. The Respondent's Agreements are just such an unlawful restraint. Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, supra, there is no merit to our colleague's view that finding the Agreements unlawful runs afoul of employees' Sec. 7 right to "refrain from" engaging in protected concerted activity. See *Murphy*

conclusions and to adopt the recommended Order as modified and set forth in full below.³

ORDER

The National Labor Relations Board orders that the Respondent, Labor Ready Southwest, Inc., a subsidiary of TrueBlue, Inc., North Hollywood, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

(b) Maintaining a mandatory arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the mandatory arbitration agreement contained within its Application for Employment (Agreement) in all of its forms, or revise it in all of its forms to make clear to employees that the Agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that it does not bar or restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all applicants and current and former employees who were required to sign or otherwise become bound to the Agreement in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Within 14 days after service by the Region, post at its North Hollywood, California facility copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of

paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 24, 2011.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 26, 2016

Mark Gaston Pearce, Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

In this case, my colleagues find that the Respondent's Dispatching, Employment and Arbitration Terms and Conditions (the Agreement) violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the Agreement waives the right to participate in class or collective actions regarding non-NLRA employment claims. I respectfully dissent from this finding for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*¹ I also dissent from my colleagues' finding that the Agreement violates Section 8(a)(1) based on interference with the right of employees to file charges with the Board.

Oil, 361 NLRB No. 72, slip op. at 18; *Bristol Farms*, 363 NLRB No. 45, slip op. at 2.

³ We shall modify the judge's recommended Order to conform to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹ 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part). The Board majority's holding in *Murphy Oil* invalidating class-action waiver agreements was denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

I agree with my colleagues, for the reasons they state, that the complaint allegation that the Respondent unlawfully enforced the Agreement is not properly before the Board.

1. The “Class Action” waiver

I agree that an employee may engage in “concerted” activities for “mutual aid or protection” in relation to a claim asserted under a statute other than the NLRA.² However, Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive class-type treatment of non-NLRA claims. To the contrary, as discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an “individual” to “present” and “adjust” grievances “at any time.”³ This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee’s right to “refrain from” exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;⁴ (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any

² I agree that non-NLRA claims can give rise to “concerted” activities engaged in by two or more employees for the “purpose” of “mutual aid or protection,” which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 23–25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7’s statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. *Id.*; see also *Beyoglu*, 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting).

³ *Murphy Oil*, above, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: “Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That *any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted*, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment” (emphasis added). The Act’s legislative history shows that Congress intended to preserve every individual employee’s right to “adjust” any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

⁴ When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) (“The use of class action procedures . . . is not a substantive right.”) (citations omitted), petition for rehearing en banc denied No. 12–60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) (“[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.”).

NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board’s position regarding class-waiver agreements;⁵ and (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).⁶ Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.

2. Interference with NLRB charge filing

I disagree with the judge’s finding and my colleagues’ conclusion that the Agreement unlawfully interferes with Board charge filing. In relevant part, the Agreement states:

I agree that any disputes arising out of my application for employment or employment that I believe I have against Labor Ready or its agents or representatives, including, but not limited to, any claims related to wage and hour laws, discrimination, harassment or wrongful termination, and all other employment related issues (*excepting only actions arising under the NLRA*) will be resolved by final and binding arbitration under the Federal Arbitration Act. Except where prohibited by law, I agree to bring any disputes I may have as an individual and I waive any right to bring or join a class, collective, or representative action. I acknowledge that my dispute will be decided by a neutral arbitrator and not by a judge or jury.

⁵ The Fifth Circuit has twice denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See *Murphy Oil, Inc., USA v. NLRB*, above; *D. R. Horton, Inc. v. NLRB*, above. The overwhelming majority of courts considering the Board’s position have likewise rejected it. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); *id.*, slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co., Inc.*, 96 F. Supp. 3d 71 (S.D.N.Y. 2015); *Nanavati v. Adecco USA, Inc.*, 99 F. Supp. 3d 1072 (N.D. Cal. 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services, Inc.*, No. 1:12–cv–00062–BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA); but see *Totten v. Kellogg Brown & Root, LLC*, No. ED CV 14–1766 DMG (DTBx), 2016 WL 316019 (C.D. Cal. Jan. 22, 2016).

⁶ For the reasons expressed in my *Murphy Oil* partial dissent and those thoroughly explained in former Member Johnson’s dissent in *Murphy Oil*, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil*, above, slip op. at 34 (Member Miscimarra, dissenting in part); *id.*, slip op. at 49–58 (Member Johnson, dissenting).

(Emphasis added.) For the reasons stated in my separate opinion in *The Rose Group d/b/a Applebee's Restaurant*, I believe that an agreement may lawfully provide for the arbitration of NLRA claims, and such an agreement does not unlawfully prohibit the filing of charges with the NLRB, particularly when the right to do so is expressly stated in the agreement itself.⁷ Necessarily, then, an agreement that altogether *excludes* NLRA claims from its scope by making arbitration inapplicable to “actions arising under the NLRA” cannot reasonably be found to interfere with Board charge filing.

For two reasons, my colleagues find that the Agreement unlawfully interferes with NLRB charge-filing notwithstanding its express exclusion of NLRA claims. I respectfully disagree with both of their rationales.

First, my colleagues find that the exclusion of “actions arising under the NLRA” is “insufficiently clear.” They reason that “without further explanation, [the exclusion] is insufficiently clear to ensure that employees with no legal training understand that they retain the right to file an unfair labor practice charge with the Board and that they can do so with or on behalf of other employees.” I disagree. The Agreement unambiguously excludes NLRA claims by making express reference to the statute itself. To the extent that some employees may be unfamiliar with *the statute*, this does not provide reasonable support for a finding that the *Agreement* is “insufficiently clear” as to the exclusion of NLRA claims. As the Fifth Circuit stated in *Murphy Oil USA, Inc. v. NLRB*, above, “it would be unreasonable for an employee to construe the [Agreements] as prohibiting the filing of Board charges when the agreement says the opposite.”⁸

⁷ 363 NLRB No. 75, slip op. at 3–5 (2015) (Member Miscimarra, concurring in part and dissenting in part). See also *Ralph's Grocery Co.*, 363 NLRB No. 128, slip op. at 6–7 (2015) (Member Miscimarra, concurring in part and dissenting in part); *GameStop Corp.*, 363 NLRB No. 89, slip op. at 4–5 (2015) (Member Miscimarra, concurring in part and dissenting in part).

⁸ Even assuming *arguendo* that some employees may be unfamiliar with the term “actions arising under the NLRA,” this is not materially different from many concepts expressed in collective-bargaining agreements that are routinely deemed enforceable by the Board and the courts, even if they are expressed in “general and flexible terms,” Archibald Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1491 (1959), or are based on practices that may be “unknown, except in hazy form, even to the negotiators,” *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580–581 (1960). Although the Agreement expressly excludes all “actions arising under the NLRA” without stating that employees retain the right to file charges with the NLRB, I believe this is a distinction without a difference. The exclusion of all NLRA actions from the Agreement’s scope precludes a finding that the Agreement interferes with NLRB charge-filing, since a charge filed with the NLRB is the very means by which “actions arising under the NLRA” are initiated. Where an agreement does not encompass NLRA claims, I believe it is unreasonable for the Board to require an affirma-

Second, my colleagues adopt the judge’s reasoning that the class-action waiver in the Agreement unlawfully interferes with Board charge-filing. In this regard, the judge and my colleagues advance a three-stage argument:⁹ (i) the Agreement states that “[e]xcept where prohibited by law, I agree to bring any disputes I may have as an individual,” (ii) an NLRB charge sometimes can be filed “with or on behalf of other employees,” and (iii) agreeing “to bring any disputes I may have as an individual” would interfere with the right to file these types of Board charges, and specialized legal knowledge is required to understand that interference with Board charge-filing is “prohibited by law.” The problem with this argument is its false, circular premise that the language in the Agreement stating “I agree to bring any disputes I may have as an individual” can be reasonably construed to interfere with the filing of Board charges, despite the Agreement’s express exclusion of “actions arising under the NLRA” in the same paragraph (indeed, the immediately preceding sentence), which contradicts such a construction.¹⁰ In this respect, I believe my col-

lleague’s statement that employees retain the right to file a charge with the NLRB.

In support of their position, my colleagues cite cases where the Board applied the sound principle that an otherwise illegal rule will not be rendered lawful based on language that would predictably be understood only by someone with specialized legal knowledge. See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006) (arbitration agreement reasonably encompassing NLRA claims, with no exception for charge filing, not saved by provision in separate document stating arbitration process “limited to disputes . . . that a court would be authorized to entertain”; among other things, language insufficient to alert nonlawyer employees of remote possibility that NLRB charges were thereby exempted), *enfd. mem.* 255 Fed. Appx. 527 (D.C. Cir. 2007); *Ingram Book Co.*, 315 NLRB 515, 516 fn.2 (1994) (facially overbroad distribution rule not saved by disclaimer that “[t]o the extent any policy may conflict with state or federal law, the Company will abide by the applicable state or federal law”); *McDonnell Douglas Corp.*, 240 NLRB 794 (1979) (facially overbroad no-distribution rule unlawful despite an exception for distribution “protected by Section 7 of the National Labor Relations Act”; employee would need to know what distribution Section 7 protects to understand what the exception allows). Unlike the general disclaimers in these cases, which would have no meaning to employees (or anyone else) not versed in labor law, every employee who reads English would understand that “actions arising under the NLRA” are not covered by the Agreement—and therefore that the Agreement cannot possibly limit his or her right to initiate an NLRA action by filing a charge with the NLRB. See also my separate opinion in *SolarCity Corp.*, 363 NLRB No. 83 (2015).

⁹ The judge and my colleagues do not expressly separate their analysis into three stages. However, I believe it is difficult to understand the analysis without breaking it into its component parts, and it consists of the three elements set forth in the text.

¹⁰ I believe the Agreement is sufficiently clear that the only disputes an employee agrees to bring “as an individual” are those subject to arbitration under the Agreement, which expressly excludes “actions arising under the NLRA.” Therefore, contrary to my colleagues, I do not believe one can reasonably interpret this language as interfering

leagues and the judge turn precedent upside down. Any reasonable interpretation of the Agreement reveals that it has no impact on NLRB charge-filing, since the Agreement excludes all “actions arising under the NLRA”; and the judge and my colleagues—though armed with good intentions—devise an implausible interpretation that, in my view, could only be advocated or adopted by lawyers.

Accordingly, as to the above issues, I respectfully dissent in part from my colleagues’ decision.

Dated, Washington, D.C. February 26, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT maintain a mandatory arbitration agreement that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the arbitration agreement contained within our Application for Employment (Agreement) in all of its forms, or revise it in all of its forms to make

with the right to file an NLRB charge (initiating an action “arising under the NLRA”) “with or on behalf of other employees.”

clear that the Agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all applicants and current and former employees who were required to sign or otherwise become bound to the Agreement in any of its forms that the Agreement has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

LABOR READY SOUTHWEST, INC., A
SUBSIDIARY OF TRUEBLUE, INC.

The Board’s decision can be found at www.nlrb.gov/case/31-CA-072914 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Rudy I. Fong-Sandoval, Esq., for the General Counsel.
Jason D. Winter, Esq. (Reminger Co., LPA), of Cleveland, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. This matter is based on a stipulated record. The charge in this matter was filed on January 17, 2012. Since the submission of this matter to me on about February 13, 2014, briefs have been received from Counsel for the General Counsel (General Counsel), and counsel for the Respondent. Upon the stipulated record, and consideration of the briefs submitted, I make the following:

FINDINGS OF FACT

I. JURISDICTION

At all material times Labor Ready Southwest, Inc., a Subsidiary of Trueblue, Inc. (Labor Ready or Respondent), has been a corporation with an office and place of business in North Hollywood, California, and has been engaged in the business of providing temporary workers. During the year ending December 31, 2013, the Respondent performed services valued in excess of \$50,000 in states other than California. At all material times, the Respondent has been an employer engaged in commerce within the meaning of the National Labor Relations Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The principal issues in this proceeding are whether the Respondent has violated and is violating Section 8(a)(1) of the Act by maintaining a mandatory arbitration agreement; and whether the language of the mandatory arbitration agreement restricts employees from access to the Board and its processes.

B. Facts

Labor Ready provides temporary job assignments that help workers bridge the gap between unemployment and permanent employment. Individuals come to Labor Ready seeking to be placed on a job assignment for Labor Ready's customers on a day-to-day basis. In order for Labor Ready to place workers in job assignments, Labor Ready requires applicants for employment to sign a Labor Ready employment application agreeing to terms contained therein.

Jeffrey Lee Allen (Allen) is a former employee of Labor Ready on whose behalf the instant charge was filed. Allen obtained work through Labor Ready from about June 1, 2007, until January 9, 2009, on approximately 50 occasions. Prior to his employment with Labor Ready, as a condition of employment, Allen filled out and signed a Labor Ready application for employment (application for employment) on May 31, 2007, that included a mandatory arbitration provision. Allen left the Respondent's employ on good terms, and with a good reputation for hard work.

The relevant language of Respondent's mandatory arbitration provision reads:

I agree that any disputes arising out of my application for employment or employment that I believe I have against Labor Ready or its agents or representatives, including, but not limited to, any claims related to wage and hour laws, discrimination, harassment or wrongful termination, and all other employment related issues (excepting only actions arising under the NLRA) will be resolved by final and binding arbitration under the Federal Arbitration Act. Except where prohibited by law, I agree to bring any disputes I may have as an individual and I waive any right to bring or join a class, collective, or representative action.

After leaving Labor Ready, on April 30, 2009, Allen, as named Plaintiff, filed a lawsuit against Labor Ready in the Superior Court of the State of California, County of Los Angeles, on behalf of himself and all other similarly situated employees. On September 28, 2011, after litigation of a number of motions from each side of the lawsuit, Labor Ready filed a Motion to Compel Arbitration based on Allen's application for employment, seeking "an order compelling the arbitration of Plaintiff's claims against it on an individual basis." On about October 28, 2011, Allen's legal counsel filed an opposition to Labor Ready's Motion to Compel Arbitration. In November 2011, the state trial court granted Labor Ready's Motion to Compel Arbitration, and ordered individual arbitration of Allen's class action lawsuit.

The parties to the lawsuit, after protracted negotiations, came to a resolution of all their claims. On August 27, 2013, U.S. District Court Judge Dean Pregerson issued an Order granting

Final Approval of Class Action Settlement. Thereafter, the Charging Party herein submitted a withdrawal request in the instant matter. The Regional Director for Region 31 refused to approve the withdrawal request of the unfair labor practice charge in this matter on the basis that the foregoing resolution and settlement of the underlying civil action between the parties did not remedy the 8(a)(1) violations alleged in the instant complaint.

The stipulation in this matter presents two issues, as follows:

ISSUE1: Whether the mandatory arbitration agreement contained in Labor Ready's Application for Employment signed by Allen, the subject of Labor Ready's September 28, 2011 Motion to Compel Allen to individual arbitration, violates Section 8(a)(1) of the Act by mandating individual arbitration of employment-related claims, as alleged in the complaint.

ISSUE 2: Whether the mandatory arbitration agreement contained in Labor Ready's Application for Employment signed by Allen, the subject of Labor Ready's September 28, 2011 Motion to Compel Allen to individual arbitration, violates Section 8(a)(1) of the Act by restricting access to the Board and its processes, as alleged in the complaint.

Analysis and Conclusions

D. R. Horton, Inc., 357 NLRB No. 184 (2012), is the controlling Board decision in this matter. The Respondent maintains that *D. R. Horton* was wrongly decided, and in its comprehensive brief significantly relies upon the recent Fifth Circuit decision which considers and discusses many of the arguments raised by the Respondent, which need not be reexamined herein, and denies enforcement of *D. R. Horton* in material respects.¹ However, I am required to follow *D. R. Horton* unless reversed by the Supreme Court. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), *enfd.* 640 F.2d 1017 (9th Cir. 1981); *Pathmark Stores, Inc.*, 342 NLRB 378 fn. 1 (2004).

The Board determined in *D. R. Horton* that as a condition of employment "employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums arbitral and judicial." 357 NLRB No. 184, slip op. at p. 12 (2012). As the mandatory arbitration provision by its terms restricts employees, as a condition of their employment, from acting concertedly by pursuing arbitral and judicial litigation of employment claims, I find that it is facially unlawful.

The complaint alleges and the General Counsel in his brief argues that the mandatory arbitration agreement also violates Section 8(a)(1) of the Act by restricting access to the Board and its processes. I agree. While, as the Respondent argues, certain language does not restrict an employee from filing "actions arising under the NLRA," nevertheless other language may reasonably be construed by employees to restrict them from concertedly filing collective charges under the NLRA. Thus the language "Except where prohibited by law, I agree to bring any disputes I may have as an individual . . ." would, I find, reasonably inhibit collective action among employees

¹ *D. R. Horton, Inc. v NLRB*, 737 F.3d 344 (5th Cir. 2013).

before the National Labor Relations Board, as the quoted language expressly permits employees to pursue only individual disputes while, in effect, simultaneously requiring them to investigate and determine whether the limitation—only individual disputes—applies to matters under the NLRA. It is reasonable to assume that the ambiguity itself, coupled with the added effort necessarily involved in resolving the ambiguity, would dissuade employees from collectively seeking redress for grievances they may have with the Respondent, and thus would inhibit them from pursuing collective action. As noted in *Ingram Book Co.*, 315 NLRB 515, 516 fn. 2 (1994), “Rank-and-file employees do not generally carry law books to work or apply legal analysis to company rules ... and cannot be expected to have the expertise to examine company rules from a legal standpoint.” See also, *Allied Mechanical*, 349 NLRB 1077, 1077 fn. 1, 1084 (2007). Accordingly, I find that the mandatory arbitration agreement restricts collective access to the Board and its processes in violation of Section 8(a)(1) of the Act as alleged.

The Respondent also maintains that the complaint should be dismissed on the basis that the matters underlying the class action lawsuit have been fully resolved and, moreover, the Charging Party has submitted a withdrawal request and is no longer interested in pursuing this Board proceeding against the Respondent. However, it is clear that the resolution of the class action lawsuit does not encompass or resolve the rights protected by the NLRA as enunciated in *D. R. Horton*. As stated by the Board in *Alberci Fruin-Colnon*, 226 NLRB 1315, 1316 (1976), “Once a charge is filed, the General Counsel proceeds, not in vindication of private rights, but as the representative of an agency entrusted with the power and duty of enforcing the Act in which the public has an interest, and dismissal does not lie as a matter of right should the charging party seek the charge’s withdrawal.” I find no merit to this argument of the Respondent.

The Respondent maintains the Board did not have the authority to decide *D. R. Horton* due to the recess appointment matter regarding the composition of the Board. See *Noel Canning V. NLRB*, 705 F.3d 490, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013). Moreover, the Respondent contends that the complaint is invalid as a result of the interim appointment of the Regional Director who issued the instant complaint. These matters are currently being considered in other forums. The Board has noted that that until such matters are ultimately decided it shall continue to fulfill its responsibilities under the Act. *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. 1, fn. 1 (March 13, 2013); *Universal Lubricants, LLC*, 359 NLRB No. 157, slip op. at 1, fn. 1 (July 16, 2013).

On the basis of the foregoing, I find the Respondent has violated and is violating Section 8(a)(1) of the Act as found herein.²

CONCLUSIONS OF LAW AND RECOMMENDATIONS

The Respondent is an employer engaged in commerce within

² As noted, the stipulation of the parties specifies two issues for resolution, and does not appear to include the complaint allegation that the Respondent unlawfully attempted to enforce the mandatory arbitration agreement before the Superior Court of the State of California.

the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent has violated Section 8(a) (1) of the Act as found herein.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that it be required to cease and desist therefrom and from in any other like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act. I shall also recommend the posting of an appropriate notice, attached hereto as “Appendix,” at the locations where the Agreement has been in effect.

ORDER³

The Respondent, Labor Ready Southwest, Inc., A Subsidiary of Trueblue, Inc, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining the mandatory arbitration agreement that requires employees to waive their right to maintain class or collective action in all forums, whether arbitral or judicial.

(b) Maintaining the mandatory arbitration agreement that restricts collective access to the Board and its processes.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action, which is necessary to effectuate the purposes of the Act

(a) Rescind or revise the mandatory arbitration agreement that requires employees to waive their right to maintain class or collective action in all forums, whether arbitral or judicial.

(b) Rescind or revise the mandatory arbitration agreement that restricts collective access to the Board and its processes.

(c) Advise all employees, by all means that employees are customarily advised of matters pertaining to their terms and conditions of employment, that the mandatory arbitration agreement has been rescinded or revised and that employees are no longer prohibited from bringing and participating in class action lawsuits against the Respondent.

(d) Advise all employees, by all means that employees are customarily advised of matters pertaining to their terms and conditions of employment, that the mandatory arbitration agreement has been rescinded or revised and that employees are no longer prohibited from collectively filing charges and collectively participating in matters before the National Labor Relations Board.

(e) Within 14 days after service by the Region, post at all locations where notices to employees are customarily posted, and transmit to employees by all means that employees are customarily advised of matters pertaining to their terms and conditions of employment, copies of the attached notice marked “Appendix.” Copies of the notice, on forms provided

³ If no exceptions are filed as provided by Section 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted and electronically transmitted to employees immediately upon receipt thereof, and shall remain posted for 60 consecutive days thereafter. Reasonable steps shall be taken by Respondent to ensure that the posted notices are not altered, defaced, or covered by any other material.

(f) Within 21 days after service by the Regional Office, file with the Regional Director for Region 31 sworn certifications of responsible officials on forms provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. April 29, 2014

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that requires employees to waive their right to maintain class or collective actions in all forums, whether arbitral or judicial regarding employment-related matters.

WE WILL NOT maintain a mandatory arbitration agreement that restricts collective access among employees to the National Labor Relations Board or its processes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL rescind or revise the mandatory arbitration agreement to make it clear to employees that the agreement does not constitute a waiver of their right in all forums to maintain class or collective actions, and that the agreement does not prohibit employees from collectively bringing and pursuing matters before the National Labor Relations Board.

WE WILL notify employees of the rescinded or revised agreement, and provide them with a copy of the revised agreement or specific notification that the agreement has been rescinded.

LABOR READY SOUTHWEST, INC., A SUBSIDIARY OF
TRUEBLUE, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/31-CA-072914 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

